

5-15-1988

## The Not-So-Golden Years: The Legal Response to Elder Abuse

David P. Mathews

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>



Part of the [Criminal Law Commons](#), [Elder Law Commons](#), [Law and Society Commons](#), [Legislation Commons](#), and the [Remedies Commons](#)

---

### Recommended Citation

David P. Mathews *The Not-So-Golden Years: The Legal Response to Elder Abuse*, 15 Pepp. L. Rev. 4 (1988)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol15/iss4/5>

This Comment is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

# The Not-So-Golden Years: The Legal Response to Elder Abuse\*

## I. INTRODUCTION

Popular folklore among Lettish peasants and farmers tells of a time past when the elderly, considered burdensome and useless, were routinely taken into the forest and left to die.<sup>1</sup> This type of treatment seems shockingly barbaric and inconsistent with our nation's long-accepted notion of honoring one's parents.<sup>2</sup> Nevertheless, recent studies have indicated that abuse of the elderly by in-home caretakers,<sup>3</sup> who are often the elderly person's own children or other family members, "exists with a frequency and rate only slightly less than that of child abuse."<sup>4</sup>

Domestic violence is not a new phenomenon in American society. The 1960's saw widespread recognition of child abuse as a national tragedy and the 1970's brought about the discovery of spouse abuse as another serious domestic problem.<sup>5</sup> Predictions in the early 1980's

---

\* For WESTLAW® computerized research regarding elder abuse and related issues, select the STAT or CR database and use this search query: "Protective Service" "Mandatory Report!" /p Elder! Aged Aging. Also select the ALLSTATES database and use this search query: "Protective Service" "Mandatory Report!" /p Elder! Aging. WESTLAW ® is a registered trademark of West Publishing Company.

1. Deutsch & Yarmolinsky, *Grandfather's Advice*, in TRADE WINDS 258-65 (1966). As legend has it, a man and his son piled their old grandfather onto the son's sled and ventured into the snowy forest in order to rid the family of caring for such a weak old man. When they came to the forest, the man left the sled and turned to go home, leaving the old man there to die. The boy asked his father not to leave the sled "because when you are old and worn out, I'll need the sled to carry you to the forest." Naturally, this changed the father's perspective on the matter and the grandfather was taken back home and cared for. *Id.*

2. HOUSE SELECT COMM. ON AGING, ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, H.R. REP. NO. 277, 97th Cong., 1st Sess. 11 (1981) [hereinafter HOUSE ABUSE REPORT]. This report notes that there is a "positive correlation between the care and respect for the elderly and the greatness of a civilization." *Id.*

3. This comment will not address the closely related, yet long-recognized problems of elder abuse in nursing homes and other institutional settings.

4. NATIONAL CLEARINGHOUSE FOR IMPROVING THE MANAGEMENT OF HUMAN SERVICES, ABUSE OF THE ELDERLY 3 (Human Services Monograph Series No. 27, Sept. 1981) [hereinafter HUMAN SERVICES] (finding that four percent of the nation's elderly may be the victims of some type of abuse, i.e., about 1 million annually).

5. HOUSE ABUSE REPORT, *supra* note 2, at 3 (citing Dr. Suzanne Steinmetz, of the University of Delaware, who has conducted studies and written on the topic of elder abuse). See generally S. STEINMETZ, THE CYCLE OF VIOLENCE XXI (1977); Steinmetz, *The Politics of Aging: Battered Parents*, SOC'Y 54 (July-Aug. 1978).

forecasted that this would be the decade of the "battered parent."<sup>6</sup>

The emergence of several studies concluding that elder abuse is a substantial and growing problem,<sup>7</sup> coupled with the report issued by the United States House Select Committee on Aging,<sup>8</sup> have prompted the majority of states to pass Adult Protective Services Acts.<sup>9</sup> These statutes vary greatly among themselves, but all provide for some method of reporting elder abuse and set guidelines for the administration of services to the victims of such abuse. The enactment of these statutes so soon after the initial revelation of the elder abuse problem has provoked a number of debates centering on such issues as the desirability and effectiveness of mandatory reporting, the civil and constitutional rights of the aged under such legislation, and the role of the federal government in protecting the elderly from abuse.

This Comment will first discuss briefly the background, causes, and types of elder abuse. It will then analyze the traditional legislative remedies available to abuse victims and will explore the Adult Protective Services Acts enacted by several jurisdictions. In conclusion, the emphasis will be placed on a carefully structured *combination* of protective services to enhance statutory requirements instead of favoring one particular jurisdiction's approach over another. Legislation preserving the elder's civil liberties and constitutional rights will ensure that the aged individual locked in an abusive environment will be better off after the imposition of protective services and not placed in a similar or worse situation.

## II. BACKGROUND

### A. *Nature and Extent of Elder Abuse*

Elder abuse is defined as "physical, sexual, psychological, or financial abuse of the elderly or otherwise causing the deprivation of their

---

6. HOUSE ABUSE REPORT, *supra* note 2, at 3 (quoting Dr. Suzanne Steinmetz).

7. See Hickey & Douglas, *Neglect and Abuse of Older Family Members: Professionals' Perspectives and Case Experience*, 21 THE GERONTOLOGIST 171 (1981); M. BLOCK & J. SINNOT, THE BATTERED ELDER SYNDROME: AN EXPLORATORY STUDY (1979) [hereinafter BLOCK & SINNOT]; Lau & Kosberg, *Abuse of the Elderly by Informal Care Providers*, AGING, Sept.-Oct. 1979, at 10. All four sources conclude that such abuse exists, yet they differ as to what exactly constitutes elder abuse and the extent of such abusive treatment.

8. HOUSE ABUSE REPORT, *supra* note 2, at 3 (concluding that elder abuse is an extremely serious, widespread, and until recently, largely hidden problem in the United States).

9. See, e.g., ALA. CODE §§ 38-9-1 to -11 (Supp. 1986); ARK. STAT. ANN. §§ 5-28-101 to -305 (1987); CONN. GEN. STAT. ANN. §§ 46a-14 to -25 (West 1986); FLA. STAT. ANN. §§ 415.101-112 (West 1986); MASS. GEN. LAWS ANN. ch. 19A, §§ 14-35 (West Supp. 1987); MO. ANN. STAT. §§ 455.010-80.5 (Vernon Supp. 1987); N.Y. SOC. SERV. LAW § 473 (McKinney 1983 & Supp. 1988); OKLA. STAT. ANN. tit. 43A, §§ 10-101 to -110 (West Supp. 1988); TEX. HUM. RES. CODE ANN. §§ 48.001-.084 (Vernon Supp. 1988).

human rights by their *relatives* or caretakers."<sup>10</sup> Often included in the definition of abuse are neglect and unsanitary living conditions.<sup>11</sup> Victims of elder abuse are statistically more likely to be over seventy-five years of age, female, under some sort of physical and/or mental impairment, and usually residing with and dependent upon their abuser.<sup>12</sup> The abuser is usually a close relative of the aged person, under a great deal of stress, and prone to substance abuse of some type.<sup>13</sup>

Estimates of the extent of the abuse range from 500,000 to a million incidents annually.<sup>14</sup> Though the various studies differ in their definitions and estimates, all agree that abuse and neglect of the elderly by their primary caretakers is extensive enough to warrant the attention of state and federal legislators.<sup>15</sup>

### *B. Causes of Elder Abuse*

Numerous factors contribute to the abuse of an elderly person by other family members, and it is not limited to lower economic classes or certain racial or ethnic groups.<sup>16</sup> Certain factors are commonly linked with the abuse of the elderly (as well as with other types of family violence) and include alcohol and drug use,<sup>17</sup> retaliation,<sup>18</sup> lack of financial resources,<sup>19</sup> mental illness,<sup>20</sup> and stress.<sup>21</sup> Additionally, the sudden introduction of an aged parent who requires special

10. HOUSE ABUSE REPORT, *supra* note 2, at 1 (emphasis added).

11. BLOCK & SINNOT, *supra* note 7, at 78 (neglect and unsanitary conditions include dirt, vermin, lack of food in the house, inadequate heat, and the smell of urine); Lau & Kosberg, *supra* note 7, at 12 (physical abuse includes neglect, such as lack of food, physical and medical care, and supervision).

12. HUMAN SERVICES, *supra* note 4, at 9.

13. *Id.*

14. *Id.* at 8.

15. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective, and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 72 (1982).

16. HUMAN SERVICES, *supra* note 4, at 11.

17. HOUSE ABUSE REPORT, *supra* note 2, at 2.

18. HUMAN SERVICES, *supra* note 4, at 12. "[C]hildren treated nonviolently as they grow up abuse their parents later on by a ratio of one in 400. If a child is mistreated violently by his parents, the chance that he will abuse them later is one in two." *Id.*

19. *Id.* at 13. Increased financial strains caused by an elder in need of care, coupled with limited government funds available for home health and respite care, often drive family members to commit abusive behavior. *Id.* See *infra* notes 156-171 and accompanying text for discussion of how certain federal programs may contribute to an abusive family atmosphere.

20. *Id.* at 14.

21. *Id.* at 15. Stress was found to be the root cause for about 36% of all reported elder abuse cases. *Id.* Further, a Massachusetts survey found that the elderly victim

care demands changes in the routines, budgets, and lifestyles of the other members of the household. This in itself may result in increased stress and anger in the younger members of the household. Unfortunately, this anger is likely to be vented upon the apparent cause of the stress, the elderly parent. Another contributing cause of elder abuse may be "ageism," a widespread negative attitude toward the elderly as a class.<sup>22</sup>

### C. *Characteristics and Types of Abuse*

Authorities differ on how to categorize the types of elder abuse, but classification into five general types is possible. These classes include physical abuse, physical neglect, financial abuse, psychological abuse, and deprivation of the senior's rights.<sup>23</sup> Physical abuse involves acts including beating, pushing, shoving, shooting, and threatening the elderly victim with a weapon.<sup>24</sup> "Physical neglect involves the intentional failure to provide the elder with necessities (food, water, etc.), to assist the elder in movement when she is physically disabled . . . or to supervise the elder when she is incapable of taking care of herself due to infirmities."<sup>25</sup> Financial abuse includes theft of money or property from elderly persons by their caretakers.<sup>26</sup> The most common type of abuse is psychological abuse, which includes verbal acts, such as name-calling, and may also involve systematic efforts to dehumanize the elderly person, possibly with the hope of pushing the elder to the brink of insanity or to suicide.<sup>27</sup> Deprivation of the elder's rights include such acts as forcing the elderly out of

---

was usually the primary source of stress to the abuser. *Id.* See also Katz, *Elder Abuse*, 18 J. FAM. L. 695, 700-04 (1979-80).

22. BLOCK & SINNOT, *supra* note 7, at 57. Ageism includes "prejudices and stereotypes which are negative in their appraisal of older persons and their role in society." *Id.* This may itself be a contributing cause of elder abuse. *Id.*

23. HOUSE ABUSE REPORT, *supra* note 2, at 2.

24. Comment, *Elder Abuse: A Pressing Need for Federal Assistance*, 5 PUB. L.F. 137, 140 (1986); Lau & Kosberg, *supra* note 7, at 12. See generally HOUSE ABUSE REPORT, *supra* note 2, at 3-7. The House Subcommittee on Aging compiled numerous examples of each type of abuse from all fifty states. One reported example of physical abuse involved a 19 year-old Illinois woman who tortured her 81 year-old grandfather, chained him to the toilet for seven days, hit him with a hammer while he slept and chained his legs together for days at a time. *Id.*

25. Comment, *supra* note 24, at 140-41.

26. HOUSE ABUSE REPORT, *supra* note 2, at 13-14 (financial abuse is often accompanied by physical abuse and is often done to obtain social security checks, Medicaid, or Medicare benefits). *Id.* See *infra* notes 156-71 and accompanying text.

27. Note, *Elder Abuse: The Merit of Mandatory Reporting Laws and The Minnesota Response*, 9 WM. MITCHELL L. REV. 365, 368-69 (1983); see also HOUSE ABUSE REPORT, *supra* note 2, at 24 (finding that verbal abuse of the elderly often includes threats of institutionalization, nursing home placement, or of being thrown out into the streets). In the District of Columbia, health officials found a severely underfed man lying in a roach-infested apartment. His family had fed him noodles with maggots and threatened to shoot him or put embalming fluid in his food if he allowed anyone else in his house. *Id.* at 26.

their homes and into institutions, or prohibiting them from marrying or making financial decisions.<sup>28</sup>

#### D. Looking to the Future

An increasingly larger percentage of the United States' population is comprised of the elderly. Clearly, the problem of elder abuse will also tend to grow. As of 1981, 26 million persons, representing 11.4% of the population, had reached the age of sixty-five.<sup>29</sup> This year, 34.9 million Americans are sixty-five and older, and by 2010 the number is expected to rise to 39.2 million.<sup>30</sup> By 2020 this figure will be near 51.4 million—about twenty percent of the population.<sup>31</sup> Due to limits on the amount of funding for such programs as Federal Supplemental Security Income,<sup>32</sup> Medicare,<sup>33</sup> or Medicaid,<sup>34</sup> younger family members will increasingly be called upon by their parents to help support them and care for them in the future. State and federal legislators must keep in mind both the special needs and circumstances of the elderly, as well as their caretakers, as they enact or modify laws concerning elder abuse.

### III. STATE LEGISLATIVE RESPONSE TO THE ELDER ABUSE PROBLEM

Three approaches have been pursued by states to remedy the problem of elder abuse. These approaches include: 1) criminal remedies ranging from traditional assault or battery charges, to statutes specifically making abuse of others a crime; 2) civil remedies including temporary restraining orders or protective orders; and 3) Adult Protective Services Acts.<sup>35</sup>

#### A. Criminal Remedies

Any type of domestic violence can be considered criminal activ-

---

28. Comment, *supra* note 24, at 142.

29. Krauskopf & Burnett, *The Elderly Person: When Protection Becomes Abuse*, TRIAL, Dec. 1983, at 61.

30. *The Graying of America*, 100 L.A. DAILY J., July 24, 1987, at 4, col. 1 (Open Forum).

31. *Id.*

32. See 42 U.S.C. § 1381 (1982). See also *infra* notes 156-171 and accompanying text.

33. See *id.* § 1395 (1982). See also *infra* notes 156-171 and accompanying text.

34. See *id.* § 1396 (West Supp. 1987). See also *infra* notes 156-171 and accompanying text.

35. See *infra* notes 61-155 and accompanying text.

ity.<sup>36</sup> Depending upon the type of abuse suffered, the elderly adult may file assault or battery, blackmail, or extortion charges.<sup>37</sup> Several states have specifically made abuse of the elderly and other types of domestic violence a crime by statute.<sup>38</sup>

Unfortunately, however, criminal remedies may not be effective to prevent abuse of elderly individuals. When the abuser is a family member,<sup>39</sup> the abused may be reluctant to use the criminal justice system. For instance, the battered parent may be too ashamed to reveal that his own children are abusive,<sup>40</sup> or may fear being institutionalized once authorities know of the abuse.<sup>41</sup> Also, the criminal justice system requires that the elderly victim be willing to undergo the physical and emotional strain of filing a complaint with police and testifying in court.<sup>42</sup> Thus, criminal remedies are largely ineffective at solving the elder abuse problem.

In addition to the elder's shame, or fear of institutionalization, other factors also tend to inhibit the effectiveness of criminal remedies. For example, increased animosity within the family caused by the elderly individual filing a complaint tends to provoke further abuse, especially since a domestic abuser is normally only briefly incarcerated upon the initial filing of a complaint.<sup>43</sup> The traditional judicial process is neither an effective solution nor deterrent, and is

---

36. See Comment, *supra* note 24, at 145 n.38.

37. *Id.* at 145.

38. See, e.g., ALA. CODE § 38-9-7 (Supp. 1987). "It shall be unlawful for any person to abuse, neglect, or exploit any adult . . . [and] any person . . . in violation [of this section] . . . shall be guilty of a misdemeanor. . . ." *Id.*; WYO. STAT. § 35-20-109 (Supp. 1987). "A person who abuses, neglects, exploits or abandons a disabled adult is guilty of a misdemeanor. . . ." *Id.*; accord ARK. STAT. ANN. § 5-28-103 (1987); CAL. PENAL CODE § 1000.6 (West 1985) (treating domestic violence as a misdemeanor); see also TEX. PENAL CODE ANN. § 22.04 (Vernon Supp. 1987) (generally making it an offense to cause an injury to an elderly person "by act or omission"). This statute has caused considerable controversy in Texas, centering around who has the duty to act. Texas law requires a *statutory* duty to act before criminal liability for failure to act can be imposed. However, Texas does not have a statute requiring a duty to care for the elderly. Therefore, commentators have claimed that it violates the State constitution. Texas is alone in requiring such a duty to act. For a complete discussion, see Goodall, *Penal Code Section 22.04: A Duty to Care for the Elderly*, 35 BAYLOR L. REV. 589 (1983).

39. Lau & Kosberg, *supra* note 7, at 12.

40. See Katz, *supra* note 21, at 711.

41. Fear of institutionalization by the elderly is not unfounded, since it often results in confusion or disorientation in the one committed and sometimes contributes to an early death. Lau & Kosberg, *supra* note 7, at 14.

42. Comment, *supra* note 24, at 145.

43. See *id.* at 146. Criminal court judges often adopt lenient attitudes toward abusers absent a showing of serious injuries or prior offenses. *Id.* They tend to be inexperienced and unsympathetic to matters traditionally handled in family court, and are concerned about prison overcrowding. *Id.* Abusers are thus often released soon after the complaint is filed. *Id.*

just as likely to aggravate an already inflamed situation.<sup>44</sup> Severe cases of violence and abuse may ultimately result in a long prison sentence and remove the abuser, but even then the problem remains, for the question of who will provide further care for the elder remains. The criminal justice system *alone* is clearly not the solution to the problem of elder abuse.<sup>45</sup>

### B. Civil Remedies

Civil remedies typically available to victims of domestic violence include restraining orders<sup>46</sup> and protective orders.<sup>47</sup> Almost every state and the District of Columbia have specifically provided for these forms of protection against intra-family abuses through statutes generally referred to as Domestic Violence Acts.<sup>48</sup> For example, in Massachusetts:

A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse . . . (a) ordering the defendant to refrain from abusing the plaintiff . . . (b) ordering the defendant to vacate forthwith the household . . . (e) ordering the defendant to pay to the person abused monetary compensation.<sup>49</sup>

Regrettably, problems with several areas of these remedies arise in their application to the elderly. In some states, such as Florida, these remedies are available solely to abused spouses;<sup>50</sup> in other jurisdictions, such as California and Montana, the availability of such remedies is conditioned on the filing of a divorce or separation petition.<sup>51</sup>

44. Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585, 642 (1969-1970).

45. See generally Quarm & Schwartz, *Legal Reform and the Criminal Court: The Case of Domestic Violence*, 10 N. KY. L. REV. 199 (1983) (finding that in Ohio, the criminalization of domestic violence did little to abate the occurrence of spouse abuse).

46. A restraining order is a legal document issued by a court decreeing that the abuser must change his violent behavior. Eisenberg, *An Overview of Legal Remedies for Battered Women* (pt. 1), TRIAL, Aug. 1979, at 28, 29.

47. A protection order is an order "command[ing] the assailant to 'cease and desist' from offensive conduct, or to stay away from or vacate the home." Note, *The Case For Legal Remedies For Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 152 (1977).

48. Comment, *supra* note 24, at 148-149.

49. MASS. GEN. LAWS ANN. ch. 209A, § 3(a), (b), (e) (West 1987); see, e.g., MISS. CODE ANN. § 43-45-21 (Supp. 1987).

50. FLA. STAT. ANN. § 741.30(1) (West 1986). "As used in this section, the term: . . . (a) 'Domestic violence' means any assault, battery, or sexual battery by a person against the person's spouse. . . ." *Id.* (emphasis added).

51. CAL. CIV. CODE § 4359(a)(2) (West Supp. 1987). During a dissolution proceeding, the superior court may issue *ex parte* orders which enjoin any party from "contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, or disturbing the peace of the other party. . . ." *Id.*; MONT. CODE ANN. § 27-19-201(5)



Since most abused elders are not abused by their spouses,<sup>52</sup> many will be unable to obtain protective orders in states with such limitations. Even where a spouse is the source of abuse, the victim may not be willing to file for divorce in order to obtain a protective order or restraining order.<sup>53</sup>

Several states do provide protection for elder abuse victims through Domestic Violence Acts, such as section 60 of the Oklahoma Protection From Domestic Abuse Act<sup>54</sup> which specifically protects the elderly and handicapped.<sup>55</sup> Nevertheless, protective orders do not always effectively protect the elderly victim from abuse. Generally, only the victim is authorized to file a complaint under such legislation.<sup>56</sup> Moreover, an elderly victim may fear that court action would only worsen the already abusive situation by increasing animosity or resulting in institutionalization.<sup>57</sup> Furthermore, if an elder does decide to resort to the courts for assistance, there may not be adequate services available once she is removed from the abusive environment.<sup>58</sup> While several states have set up shelters, some are limited to victims of spouse abuse only,<sup>59</sup> leaving abused seniors few alternatives less drastic than nursing home placement or other similar facilities. Therefore, the abused elder may choose to remain in the abusive family environment rather than be placed in a cold, impersonal institution.

Most of the civil remedies available to elderly individuals were designed to apply to other types of abuse, namely spouse abuse. After the recognition of and publicity centering around elder abuse in

---

(1987) (preliminary injunction available on demonstration that the applicant has suffered or may suffer physical abuse under the provisions for marital dissolution or separation).

52. See Lau & Kosberg, *supra* note 7, at 12. Results of a study involving 49 individuals involved in the abuse of 39 elderly clients found that in only five cases was the husband the abuser. *Id.*

53. Comment, *supra* note 24, at 150.

54. OKLA. STAT. ANN. tit. 22, § 60.2 (West Supp. 1988).

55. *Id.* § 60.1. See also MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 1987) (including any "blood relative" as a family or household member able to file a complaint). Since elder abuse is most often inflicted by family members, statutes similar in scope to the Massachusetts law will also apply to the elderly. See *supra* notes 10-22 and accompanying text.

56. But see, e.g., N.D. CENT. CODE § 14-07.1-02 (1981) (allowing family members to request protective orders on behalf of other family members). Only three states allow those other than family members to file on behalf of the victim. See Comment, *supra* note 24, at 151 n.63.

57. See *supra* notes 40-44 and accompanying text.

58. "[M]ost shelters aren't designed for older women. One of my clients went to a shelter . . . but she had to walk up three floors to get to her room." Hoback, *More Vulnerable Than Wives?*, MS., July, 1981, at 17 (from an interview with a counselor for older women).

59. See, e.g., KY. REV. STAT. ANN. § 209.160 (Michie/Bobbs-Merrill 1982) (providing only for a spouse abuse shelter fund).

the early 1980's,<sup>60</sup> the apparent inadequacies of the criminal and civil justice systems in dealing with the problem prompted many states to enact new legislation focusing specifically on elder or adult abuse. These statutes are generally referred to as Adult Protective Services Acts.

### C. *Adult Protective Services Acts*

Well over half the states have passed legislation designed specifically to protect the elderly from abuse.<sup>61</sup> The statutes usually include some type of reporting requirement together with guidelines concerning the administration of protective services. In the discussion of these acts which follows, the issues raised by mandatory reporting requirements will be treated first, followed by an analysis of the legal issues raised by the protective services provided for by the acts which are triggered by a report of suspected or actual abuse.

#### 1. *Mandatory Reporting*

States mandating reports of elder abuse typically require health care professionals,<sup>62</sup> law enforcement officials, social workers, and clergymen to report evidence of such abuse.<sup>63</sup> Some states go so far as to require "all persons who know or have reasonable cause to suspect abuse" to report the abuses.<sup>64</sup> Others make reporting voluntary for nonprofessionals and mandatory for professionals.<sup>65</sup> Still others provide for voluntary reporting by all persons who suspect or know

---

60. See HOUSE ABUSE REPORT, *supra* note 2. See also Redmond, *Hitting the Elderly*, 2 FAM. ADVOC. 17-19 (Winter 1980) (recognizing the increasing numbers of abused old people and advocating the need for Adult Protective Services); Middleton, *Aid to the Gray*, 69 A.B.A. J. 1357 (Oct. 1983) (stressing that attorneys must be more attuned to the unique legal needs of the elderly).

61. See *supra* note 9 and accompanying text.

62. See, e.g., ALA. CODE § 38-9-8 (Supp. 1986) (requiring all physicians who have reasonable cause to believe that any adult protected under the statute is being abused, neglected, or exploited to report it to the proper authorities).

63. Comment, *supra* note 24, at 153; see also, e.g., ME. REV. STAT. ANN. tit. 22, § 3477(1) (Supp. 1987).

64. See, e.g., TEX. HUM. RES. CODE ANN. § 48.036(a) (Vernon Supp. 1987). See also *infra* notes 95-104 and accompanying text (discussing effectiveness of reporting statutes).

65. See, e.g., OHIO REV. CODE ANN. § 5101.61(b) (Anderson Supp. 1987); D.C. CODE ANN. § 6-2503(a) (Supp. 1987). For a detailed discussion of the District of Columbia's Adult Protective Services Act of 1984, see Lewis, *Toward Eliminating the Abuse, Neglect, and Exploitation of Impaired Adults: The District of Columbia Adult Protective Services Act of 1984*, 35 CATH. U.L. REV. 1193 (1986).

of abusive treatment.<sup>66</sup> Proponents of mandatory reporting claim that since most elders do not report or seek protection from abuse, reporting laws are essential to identify cases of abuse hidden from the public eye and to establish reliable figures on the extent of elder abuse.<sup>67</sup> Even so, mandatory reporting statutes have drawn fierce criticism for encouraging ageism,<sup>68</sup> as well as for being ineffective at preventing elder abuse.<sup>69</sup>

Statutes calling for mandatory reporting of elder abuse were enacted shortly after Block and Sinnot recommended that these laws be similar to those designed for child abuse reporting and protective services.<sup>70</sup> The House Select Committee on Aging, acting in response to studies such as Block and Sinnot's, proposed a federal provision for elder abuse prevention<sup>71</sup> patterned after the Child Abuse Prevention and Treatment Act.<sup>72</sup> The Child Abuse Act conditions state eligibility for grants to improve child protection services on the state's enactment of measures for preventing abuse and neglect, and reporting requirements.<sup>73</sup> The proposed federal act never became law,<sup>74</sup> but numerous states did enact elder abuse reporting statutes modeled after the child abuse provisions.<sup>75</sup>

Elderly adults and children do share certain common attributes. Children, as well as many seniors, are dependent upon others to care for them physically and financially.<sup>76</sup> Ironically, we come into this world totally helpless, dependent upon others to sustain us, and we often leave this world in the very same state.<sup>77</sup> Caring for a child can be extremely demanding, and caring for an adult may be just as challenging financially, emotionally, and physically.<sup>78</sup> As previously dis-

---

66. See, e.g., IOWA CODE § 235B.1(4)(a) (1985).

67. Katz, *supra* note 21, at 712.

68. Comment, *Mandatory Reporting of Elder Abuse: A Cheap But Ineffective Solution to the Problem*, 14 FORDHAM URB. L.J., 723, 734 (1986).

69. Katz, *supra* note 21, at 712.

70. BLOCK & SINNOT, *supra* note 7, at 97.

71. See H.R. 769, 97th Cong., 1st Sess. (1981) (Prevention, Identification, and Treatment of Elder Abuse Act of 1981) [hereinafter ELDER ABUSE ACT]. This Act provided for: (1) a National Center on Elder Abuse where research would be done to explore the problem, (2) funding to various federal agencies, and (3) funding to state programs provided the state had enacted mandatory reporting laws. HOUSE ABUSE REPORT, *supra* note 2, at 126-29. The Act was referred to a committee, never reported out of the committee, and was never introduced to Congress. See Note, *supra* note 27, at 384 n.145. As such, no federal law exists bearing directly upon abuse of the elderly.

72. 42 U.S.C. §§ 5101-5107 (1982).

73. Katz, *supra* note 21, at 704.

74. See *supra* note 71.

75. Child abuse reporting statutes generally require physicians to report child abuse. Katz, *supra* note 21, at 704.

76. *Id.* at 716.

77. *Id.*

78. *Id.*

cussed,<sup>79</sup> this increased burden may be a contributing cause of senior abuse by other family members. Finally, the aged and the young are both considered to be politically weak and lacking in legal protection,<sup>80</sup> and thus in need of special laws to protect them.

Although elders and children share common traits, there are distinctions which call for placing abused elders in a different legal status than that of abused children. "To be a *child* is to be at risk, dependent, and without capacity or authority to decide what is 'best' for oneself. To be an *adult* is to be a risktaker, independent, and with capacity and authority to decide and to do what is 'best' for oneself."<sup>81</sup> Child abuse reporting statutes are predicated upon the assumptions that children are *incompetent*, helpless, and vulnerable, and that society therefore has an inherent protectible interest in children.<sup>82</sup> The enactment of laws making the reporting of abuse mandatory, whether regarding children or elders, falls within the states' power under the doctrine of *parens patriae*.<sup>83</sup> The doctrine's premise is that the state must protect those who cannot speak for or protect themselves.<sup>84</sup> Mandatory reporting of elder abuse therefore implies that senior citizens, like infants, are incompetent and unable to report abuse on their own. But the failure of an elder to report abusive treatment does not always mean he is incapable of doing so.<sup>85</sup> Rather, the aged individual may have made a competent, rational decision not to report the abuse.<sup>86</sup> The implicit assumption of incompetence in the mandatory reporting provisions infantilizes elders and

---

79. See *supra* notes 21-22 and accompanying text.

80. Katz, *supra* note 21, at 716.

81. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 645 (1977) (emphasis in original).

82. Palinscar & Cobb, *The Physician's Role in Detecting and Reporting Elder Abuse*, 3 J. LEGAL MED. 413, 433 (1982). See also Faulkner, *supra* note 15, at 76 ("Mandatory reporting statutes are premised on . . . the desire of the state to protect those who cannot protect themselves. . . ."); Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103, 110-11 (1974).

83. See generally Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215 (1975) (a detailed discussion of the state's role in providing protective services for the elderly, including guardianships and conservatorships).

84. Lee, *supra* note 69, at 730-31. *Parens patriae* is discussed in further detail *infra* notes 118-22 and accompanying text.

85. Lau & Kosberg, *supra* note 7, at 11. "Pride, embarrassment, fear, isolation, [or] lack of access to services" may be reasons for failure of the victim to report abuse. *Id.*

86. Comment, *supra* note 68, at 732 (noting that the alternative to the abusive environment may be institutionalization, and that elders may view that as even less desirable than remaining in the abusive home situation).

may contribute to ageism in our society.<sup>87</sup>

Block and Sinnot declare that ageism is characterized by "prejudices and stereotypes which are negative in their appraisal of older persons and their role in society."<sup>88</sup> This bias against the elderly is often cited to be a contributing cause of elder abuse.<sup>89</sup> The unfortunate result may be that mandatory reporting statutes enacted to aid the victims of elder abuse actually further the very evil they were designed to alleviate by encouraging ageism. Professor Katz foresaw this danger and warned: "Above all, laws designed to protect the elderly must not contribute to stereotyping of the aged . . . as incompetents who cannot make decisions regarding their own welfare."<sup>90</sup>

An underlying assumption of mandatory reporting provisions is that services will be available to assist the abused victim after the harm is reported.<sup>91</sup> However, this assumption is not always correct. The child abuse field has already encountered a lack of available services to support abuse victims.<sup>92</sup> Furthermore, the Block and Sinnot study found that in ninety-five percent of the cases studied, in which an elderly victim of abuse sought social services, the assistance was not available.<sup>93</sup> Resources to provide services are scarce and expected to shrink in the future as current projections predict reductions in services and programs for children and elders.<sup>94</sup> Unless states are willing to increase funding for services to protect abused elders once detected, mandatory reporting will be of limited effect in remedying elder abuse.

Numerous practical problems also plague mandatory reporting statutes. There is considerable controversy centering on the question of who is in the best position to report abuse of the elderly. Statutes which mandate reporting universally include physicians and often include others in the "healing professions" within the class required to report.<sup>95</sup> Although physicians are often in the best position to detect

---

87. BLOCK & SINNOT, *supra* note 7, at 57.

88. See Faulkner, *supra* note 15, at 90.

89. Katz, *supra* note 21, at 703 (noting possible link between misconceptions toward the elderly and the creation of abusive situations); HUMAN SERVICES, *supra* note 4, at 12 (listing ageism as a relevant factor causing elderly abuse).

90. Katz, *supra* note 21, at 704. Some Acts mandating the reporting of abuse are themselves clearly ageist. See, e.g., FLA. STAT. ANN. § 415.102 (West 1986) (applies to "aged" or disabled persons only); TEX. HUM. RES. CODE ANN. § 48.002(1) (Vernon Supp. 1987) (applying only to those 65 and older). Others cover all adults 18 years and older, but refer specifically to the elderly in the statute. See Lee, *supra* note 69, at 738.

91. Issues concerning the validity and constitutionality of protective services for adults is addressed *infra* at notes 115-55 and accompanying text.

92. Faulkner, *supra* note 15, at 81.

93. BLOCK & SINNOT, *supra* note 7, at 79.

94. Faulkner, *supra* note 15, at 78-79 (noting that reductions have been made despite a decade of public outrage at child abuse, spouse abuse, and recently, elder abuse).

95. See, e.g., ARK. STAT. ANN. § 5-28-203 (1987).

and diagnose abuse or neglect, they seldom report suspected cases of abuse.<sup>96</sup> On the other hand, relatives, neighbors, and friends of the abused elder are probably just as likely to detect abuse cases but these individuals are not required to report under many state statutes.<sup>97</sup> These factors cast doubt upon the effectiveness of mandatory reporting in detecting abused senior citizens.

Generally speaking, elder abuse is also much more difficult to detect than child abuse.<sup>98</sup> For instance, ocular damage such as a detached retina or retinal hemorrhaging is a condition which immediately raises suspicions of child abuse, "yet the same symptoms may be present in an elderly person who has never been struck about the head, particularly if the person suffers from high blood pressure or diabetes."<sup>99</sup>

In addition to being difficult to detect, there is no "Battered Elder Syndrome"<sup>100</sup> counterpart to the legally qualified diagnosis of Battered Child Syndrome.<sup>101</sup> Thus, it is unlikely that courts will accept expert medical testimony showing the existence of such a syndrome.<sup>102</sup> Even though mandatory reporting provisions generally im-

---

[A]ny physician, surgeon, coroner, dentist, osteopath, resident intern, registered nurse, hospital personnel, . . . social services worker, mental health professional, peace officer, or law enforcement official . . . [having] reasonable cause to suspect that an endangered adult has been subjected to conditions or circumstances which would reasonably result in abuse . . . shall immediately report. . . .

*Id.*

96. Palinscar & Cobb, *supra* note 82, at 421. Physicians share the dubious distinction of reporting the fewest cases of abuse with lawyers and home health aides. *Id.*

97. Comment, *supra* note 68, at 740. A study focusing on states with mandatory reporting requirements found that the majority of reports came from nonmandated sources. *Id.* at 740 n.86.

98. Palinscar & Cobb, *supra* note 82, at 426-28.

99. *Id.* at 426. Other symptoms of child abuse which do not readily transfer to elder abuse cases include: (1) contusions, which are telltale signs of child abuse, can be caused by decreased elasticity of blood vessels in elderly persons; (2) bones of elderly persons which lack calcium and protein may break spontaneously without suffering a blow whereas broken bones in children are more easily traceable to abuse. *Id.*

100. Block and Sinnot were the first to use this term to characterize elder abuse as a syndrome. Katz, *supra* note 21, at 696 n.2.

101. Comment, *supra* note 68, at 744. The Battered Child Syndrome is a judicially admissible diagnosis. It is defined as a "clinical condition in young children who have received serious physical abuse, . . . [and] a frequent cause of permanent injury or death." Kempe, *The Battered Child Syndrome*, 181 J. A.M.A. 105, 105 (1962). Due to the greater imprecision involved in determining the causes of injuries to elderly individuals, the Battered Elder Syndrome is not yet judicially acceptable evidence. Comment, *supra* note 68, at 743-44.

102. Comment, *supra* note 68, at 744. See also Palinscar & Cobb, *supra* note 82, at 424-25 (physicians may be reluctant to testify in an elder abuse case due to the diffi-

pose misdemeanor penalties for failure to report,<sup>103</sup> this alone cannot alleviate the problems of uncertainty in detection and in admissibility of evidence in court.<sup>104</sup> It is thus unlikely that such statutes will be effective in furthering the battle against elder abuse.

Another problem with requiring physicians and other health officials to report suspected abuse of an elder is the possibility of encroachment upon the physician-patient privilege. This statutory evidentiary privilege makes all communication with clients or patients confidential.<sup>105</sup> There are several exceptions to this privilege, such as in cases of violent crime<sup>106</sup> and child abuse.<sup>107</sup> In the case of violent crime, the exception is designed to protect the general public; in child abuse cases, the exception is intended to protect the child, whom the law assumes is not adequately protected.<sup>108</sup> Statutes which make the reporting of elder abuse mandatory abrogate the physician-patient relationship in situations involving known or suspected adult abuse, neglect, or exploitation, and constitute a direct exception to the privilege.<sup>109</sup> Since this exception is not likely to protect society in general from violent crime,<sup>110</sup> it must rest on the as-

---

culty in admitting medical evidence, the lack of understanding of the area of elder abuse, and the fact that many suspected abuses are not clear-cut).

103. Comment, *supra* note 68, at 741-42 (normally fines, imprisonment or both). See also ARIZ. REV. STAT. ANN. § 46-454(J) (Supp. 1987) (failure to report punishable as misdemeanor). But see MO. ANN. STAT. § 660.255 (Vernon Supp. 1987) (mandatory reporting, but no penalty for noncompliance).

104. See, e.g., *Landeros v. Flood*, 17 Cal. 3d 399, 410, 551 P.2d 389, 394, 131 Cal. Rptr. 69, 74 (1976). "The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts . . . and can only be proved by their testimony . . ." *Id.* Statutes generally require that one report if there is a reasonable cause to know of or suspect abuse. See, e.g., statute quoted *supra* note 95. Furthermore, demonstrating reasonableness requires expert testimony and since research has not yet precisely established what constitutes "battered elder syndrome," such testimony is unlikely to be available. See also Lee, *supra* note 69, at 744.

105. See, e.g., N.Y. CIV. PRAC. L. § 4504 (McKinney Supp. 1988) "[A] person authorized to practice medicine . . . shall not be allowed to disclose any information . . . acquired in attending a patient in a professional capacity . . ." *Id.* See also *id.* § 4505 (clergy); *id.* § 4507 (psychologists); *id.* § 4508 (social workers). But see ILL. ANN. STAT. ch. 110, para. 8-802 (Smith-Hurd Supp. 1987) (patient may expressly waive privilege).

106. See, e.g., ILL. ANN. STAT. ch. 110, para. 8-802 (Smith-Hurd Supp. 1987).

107. *Id.*

108. See Faulkner, *supra* note 15, at 82. "In short, the best interests of the child overrides the parent's right to assert a self-protective claim on the patient's behalf." *Id.* at 83 n.70 (explaining why the doctor-patient privilege does not apply to child abuse).

109. See, e.g., FLA. STAT. ANN. § 415.109 (West Supp. 1987). For a detailed discussion of Florida's Adult Protective Services Act, see Comment, *A Response to the Problem of Elder Abuse: Florida's Revised Adult Protective Services Act*, 14 FLA. ST. U.L. REV. 745 (1986).

110. The exception to protect society from crime applies, for example, when the wounded patient is a participant in the crime, and thus it is in the public's best interest for the doctor to report the injury. Faulkner, *supra* note 15, at 83. It is highly unlikely, however, that the abused elder will ever be a party to criminal activity. It is just as improbable that the abuser will commit such acts against the general public. *Id.*

sumption that the elder occupies a position like that of an infant and thus may further the destructive attitudes of ageism.<sup>111</sup>

Finally, requiring health professionals to report an elder's abusive situation may discourage the elder from seeking needed medical care. For example, if an elder knows that information concerning the abuse must be reported to a state agency, triggering an embarrassing investigation, she may forego consulting a physician altogether.<sup>112</sup> On the other hand, if the abuse is reported, and the investigation determines protective services are necessary, the elder's lack of consent to such services may require a hearing to determine competency or the need for involuntary services.<sup>113</sup> Thus, the abused victim may fear the unpleasantness involved in seeking help more than the pain of facing continued abuse. The state's efforts to detect and remedy the elder abuse problem may well be hampered by the negative side-effects of the reporting requirements enacted to prevent such abuse.<sup>114</sup>

## 2. Adult Protective Services

Upon receipt of a report that a senior citizen is being or has been abused by her primary caretaker, the implementation of adult protective services must follow in order for the abused elder's situation to improve. How these services are tailored to meet the special needs of the elderly raise a number of questions such as: (1) Are the services to be forced upon those elderly who do not consent to their imposition? (2) What due process requirements must be complied with? and (3) What factors should govern the choice of which type of protective services to administer?

Adult protective services are defined as "a system of services—preventive, supportive, and surrogate—aimed at the elderly or other disabled person[s] living in the community to enable them to maintain independent living (thus avoiding unneeded institutionalization), while at the same time protecting them from abuse and exploitation."<sup>115</sup> Protective services involve two components: the delivery of

---

111. See *supra* notes 88-90 and accompanying text.

112. See CONN. GEN. STAT. ANN. § 46a-15, -16 (West 1986) (requiring the commissioner, upon receipt of a report of suspected or actual abuse, to cause a prompt and thorough evaluation which includes a *visit* with the elderly person and consultation with those having knowledge of the facts in the case).

113. See, e.g., *id.* § 46a-17. See also *infra* notes 117-119 and accompanying text.

114. See Comment, *supra* note 68, at 750-51.

115. Comment, *supra* note 24, at 152. See also CONN. GEN. STAT. ANN. § 46a-14(4) (West 1986); N.Y. SOC. SERV. LAW § 473(a)-(f) (McKinney 1983). "The term 'protective



the protective services, including social and health care services, and the actual or potential legal power to intervene into the elder's life and make decisions for that person.<sup>116</sup> The problems with regard to the elderly lie principally in the secondary component of protective services—how these services are implemented.

If the elder consents to protective services offered by the state, no legal action is necessary. However, refusal by the victim to accept services deemed necessary and reasonable by doctors, lawyers, and caseworkers often triggers proceedings which may impose protective services on unwilling and nonconsenting individuals.<sup>117</sup> These procedures are rooted in the state's *parens patriae* power over those considered to be unable to protect or care for themselves.<sup>118</sup> This power generally applies to such protective services as incompetency and guardianship proceedings, involuntary medical treatment, and involuntary confinement.<sup>119</sup> The protective services legislation accompanying mandatory reporting statutes tends to be tainted with ageism. Numerous state guardianship procedures and other protective services use age as a criterion for possible intervention and effectively equate old age with disabilities such as mental illness.<sup>120</sup> Such attitudes contained in various state laws tend to reinforce society's destructive notion that older persons are dependent and unfit to care for themselves.<sup>121</sup>

However, age alone cannot validly trigger the state's *parens patriae* power over an individual. "[O]nce the age of majority is reached the decision-making power over one's life belongs to the individual; that power is not lost by virtue of old age alone."<sup>122</sup> This power includes

---

services' means services provided by the state or other governmental or private organizations or individuals which are necessary to prevent abuse, neglect, exploitation or abandonment." CONN. GEN. STAT. ANN. § 46a-14(4) (West 1986).

116. Regan, *Intervention Through Adult Protective Services Programs*, 18 THE GERONTOLOGIST 250, 251 (1978).

117. Faulkner, *supra* note 15, at 85. See, e.g., CONN. GEN. STAT. ANN. § 46a-19(a) (West 1986).

If an elderly person does not consent to the receipt of reasonable and necessary protective services . . . such services shall not be provided or continued, except that if the commissioner of human resources has reason to believe that such elderly person lacks capacity to consent, he may seek court authorization to provide necessary services. . . ."

*Id.* The commissioner is also authorized to petition the court for appointment of a conservator in order to obtain the elder's consent. *Id.* § 46a-20. Accord N.C. GEN. STAT. § 108A-104, -105 (Supp. 1985).

118. See Horstman, *supra* note 83, at 219.

119. Note, *supra* note 27, at 377 n.101. Guardianship refers to the protection and care of an individual whereas conservatorship typically refers to protection and care of the estate. Horstman, *supra* note 83, at 215 n.1.

120. Faulkner, *supra* note 15, at 85. See N.Y. MENTAL HYG. LAW § 77.01 (McKinney 1983) (listing advanced age along with alcohol and drug abuse, mental illness, and infirmity as bases for appointing a conservator of property).

121. Faulkner, *supra* note 15, at 86.

122. Katz, *supra* note 21, at 717-18.

the right to refuse medical treatments or protective services. The constitutional right to privacy<sup>123</sup> has been found to be broad enough to encompass decisions to refuse medical treatment.<sup>124</sup> As Professor Katz points out, if one has the right to refuse medical treatment even though death may result from that choice, there must surely be a right to make less serious choices such as those involving one's lifestyle or living conditions.<sup>125</sup> Therefore, imposing involuntary protective services on the elderly without clearly showing the individual to be legally incompetent may amount to a violation of their constitutional right to privacy.

Several states also impose protective services upon elderly victims of abuse who are found in an "emergency" situation.<sup>126</sup> An emergency may be said to exist where the elderly person is in substantial risk of death or immediate and serious physical or mental harm.<sup>127</sup>

Regardless of the reason why protective services are imposed, due process requirements must be carefully adhered to by state agencies administering the services. This type of state intervention may result in the deprivation of elders' physical liberty, right to make personal decisions, or right to control their property.<sup>128</sup>

In the nonemergency guardianship or involuntary services context, due process requires a weighing of the state's *parens patriae* power to intervene against the individual's civil rights.<sup>129</sup> Such balancing presupposes that a determination of the individual's capacity to consent has been made. State provisions vary widely in their definitions of incompetency. Some lack clear definitions of incompetency;<sup>130</sup> others

123. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (unwritten constitutional right to privacy exists within penumbra of specific guarantees of the Bill of Rights).

124. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976). See also *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980) (right to refuse medical treatment upheld based on right to privacy); *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (1962). "[I]t is the individual who is the subject of a medical decision who has the final say. . . ." *Id.* at 28, 252 N.Y.S.2d at 706.

125. Katz, *supra* note 21, at 720. See generally *Olmstead v. United States*, 277 U.S. 438 (1928) (right to be let alone from governmental interference is most comprehensive and valued right of civilized man).

126. See, e.g., ALA. CODE § 38-9-5 (Supp. 1986) (Department of Human Resources may obtain court authorization for emergency protective services if such care is urgently and immediately necessary for victim's health and protection).

127. See Comment, *supra* note 109, at 760.

128. Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111, 1121 (1981).

129. See Comment, *supra* note 109, at 760.

130. See, e.g., IOWA CODE ANN. § 235B.1 (West 1985) (providing for appointment of a guardian or commitment without clearly defining the standard for determining competency).

base the definition on age alone;<sup>131</sup> still others base the definition on some level of functional incapacity.<sup>132</sup> Vague definitions of incompetency may permit unconstitutional invasions into an individual's sphere of independence.<sup>133</sup>

The Constitution's guarantee of procedural due process requires, prior to the deprivation, that notice be given of court proceedings calculated to allow for interested parties to present their objections.<sup>134</sup> The notice provided in guardianship or involuntary protective services hearings generally ranges from forty-eight hours to ten days.<sup>135</sup> However, an elderly person who is confused or unaware of the seriousness of the hearing, might not appreciate the importance of the legal document conveying the notice.<sup>136</sup> If the individual is mentally ill or otherwise incompetent, the paper stating the time, place, and subject matter of the hearing may not constitute reasonable notice. Professor Regan suggests that states should require that counsel be appointed for such clients to ensure due process.<sup>137</sup>

In life-threatening situations, however, there may not be time for a hearing. Under such circumstances, the state's power to act lies not in *parens patriae*, but rather in its obligation to preserve life whenever it can.<sup>138</sup> In emergency situations, the state may exercise this substantial interest by protecting the individual and the resulting temporary loss of liberty does not offend due process.<sup>139</sup> States must be careful, however, not to define "emergency" situation too broadly since, as with incompetency determinations, vague and sweeping definitions may be unconstitutional.<sup>140</sup>

---

131. See, e.g., VA. CODE ANN. § 63.1-55.2 (1987) ("incapacitated persons" include adults impaired by reason of advanced age).

132. See, e.g., ALA. CODE § 38-9-2(4) (Supp. 1986) (referring to conditions such as physical or mental illness which substantially impair one from providing own care or protection).

133. Comment, *supra* note 68, at 737 n.67. See also *Addington v. Texas*, 441 U.S. 418 (1978) (imposing "clear and convincing" standard of proof in civil commitment proceedings). The clear and convincing standard would likely apply to guardianship or involuntary protective services procedures. Comment, *supra* note 109, at 759. In states employing vague definitions of incompetence, this standard may be impossible to meet.

134. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

135. See, e.g., OKLA. STAT. ANN. tit. 43A, § 10-108(C) (West Supp. 1987) (48 hours); UTAH CODE ANN. § 55-19-4(7)(b) (1986) (10 days).

136. Regan, *supra* note 128, at 1118.

137. *Id.*

138. See, e.g., *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980). See also *In re Byrne*, 402 So. 2d 33 (Fla. 1981), *appeal dismissed sub nom. In re Turner*, 455 U.S. 1009 (1982) (due process requirements inapplicable in true emergency situation).

139. *Fhagen v. Miller*, 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393, *cert. denied*, 409 U.S. 845 (1972).

140. A statute may violate the due process "vagueness" test by failing to comport with two well recognized requirements: (1) a statute may be so unclear that "men of common intelligence must necessarily guess at its meaning." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); (2) a statute may fail to set out explicit standards for

Although the courts have found that the waiver of due process requirements is sometimes necessary to secure a state's interest in the safety of its citizens,<sup>141</sup> many states call for a hearing promptly after imposition of protective services.<sup>142</sup> The post-services hearing approach allows the state to implement the "least restrictive alternative" since care and protection are provided "without unduly restricting the abuse victim's liberty and constitutional rights."<sup>143</sup> This "least restrictive alternative" approach has been described as "choosing a solution which does not take over the elder's life, but underwrites it; a solution which not only protects, but also serves."<sup>144</sup> For example, California provides for court-ordered conservatorships in lieu of guardianships, which often result in nursing home placement.<sup>145</sup> The enstatement of guardianship takes away a person's right to vote, marry, manage property, make a will, and choose where to live.<sup>146</sup> A conservatorship, however, is designed to assist the older person with her own money management, physical safety, nutrition, and shelter concerns.<sup>147</sup> The person under a conservatorship can continue an active lifestyle with court-ordered protective services imposed *only* in areas where the elder can no longer cope.<sup>148</sup>

Several states achieve the least restrictive alternative by requiring caseworkers to seek alternative protective services and reserve institutionalization as a measure of last resort. The State of Oklahoma's

---

those required to apply it and, therefore, lead to arbitrary and discriminatory application. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

141. See *State ex rel Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982) (en banc); see generally *Fuentes v. Shevin* 407 U.S. 67 (1972) (outright seizure without due process protection permitted where necessary to secure an important governmental or general public interest).

142. See, e.g., S.C. CODE ANN. § 23-1-220(F) (Law. Co-op. 1986). After an adult believed to be in a life-threatening situation is taken into custody, a hearing must be held within 72 hours to determine whether the adult actually is in a life-threatening situation as defined by the statute. *Id.* But see Comment, *supra* note 24, at 158-59. Although the South Carolina statute provides for a hearing, its definition of "adult in life-threatening situation" is so broad that it effectively allows the department to take any person unwilling or unable to consent into custody. *Id.*

143. Comment, *supra* note 24, at 156. See also *Lessard v. Schmidt*, 349 F. Supp. 1078, 1095-96 (E.D. Wis. 1972), *vacated and remanded for more specific injunctive order*, 414 U.S. 473 (1974) (person suffering from mental illness cannot be totally deprived of liberty if less drastic means for achieving the same basic purpose are available).

144. Note, *supra* note 27, at 379.

145. Redmond, *supra* note 60, at 18.

146. *Id.* at 17; Horstman, *supra* note 83, at 231 (guardianship reduces elder's status to that of a child).

147. Redmond, *supra* note 60, at 18.

148. *Id.*

statute, for example, expressly states a preference for leaving clients in their present living conditions.<sup>149</sup> Other states require special findings before an elder may be placed in an institution.<sup>150</sup>

Other states, however, do not effectively comply with the least restrictive alternative approach. Information from the Connecticut Department of Human Resources indicates that sixty percent of the individuals who received medical care resulting from mandatory reporting in that state did not return home, but were placed in an institution.<sup>151</sup> Wisconsin places a heavy statutory emphasis on placement rather than on protective services.<sup>152</sup> One study found that "known instances of judicially ordered services, as distinct from placement, were rare in Wisconsin."<sup>153</sup>

As the need for adult protective services grows with the continual "graying of America,"<sup>154</sup> states must meet that demand with services respecting individuals' civil liberties and constitutional rights. State statutes designed to detect and alleviate elder abuse are not free from the strictures of federal constitutional law. The federal government is involved in many ways with the problem. In fact, the United States Government played a substantial role in bringing this social problem to the public's attention.<sup>155</sup> Although adult protective services are exclusively governed by state law, federal programs and policies have a pronounced effect on how the elder abuse problem is handled.

#### IV. THE FEDERAL RESPONSE TO ELDER ABUSE

In 1981, the House Select Committee on Aging released a report which defined the elder abuse problem, gave extensive examples showing its scope, and proposed the Prevention, Identification, and Treatment of Elder Abuse Act of 1981 (PITEAA).<sup>156</sup> PITEAA would have established a National Center on Elder Abuse, provided assistance to agencies dealing with abused elders, and funded programs in states requiring mandatory reporting.<sup>157</sup> PITEAA was never passed,

---

149. OKLA. STAT. ANN. tit. 43A, § 10-107(B) (West Supp. 1988). "[T]he court shall authorize only that intervention which it finds least restrictive of the liberty and rights of said person . . . [and] [w]henver it is consistent with the welfare and safety of the person, the court shall authorize that involuntary protective services be administered . . . in his present living accommodations." *Id.*

150. See, e.g., ALA. CODE § 38-9-6(c) (Supp. 1986).

151. Faulkner, *supra* note 15, at 85.

152. WIS. STAT. ANN. § 55.06(9)(a) (West 1987). "Placement shall be made in the least restrictive environment . . . Placement may be made to such facilities as nursing homes, public medical institutions. . . ." *Id.* (Emphasis added).

153. Regan, *supra* note 128, at 1120.

154. See *supra* notes 29-31 and accompanying text.

155. See HOUSE ABUSE REPORT, *supra* note 2.

156. *Id.* See also ELDER ABUSE ACT, *supra* note 71.

157. ELDER ABUSE ACT, *supra* note 71.

but federal government programs such as the Supplemental Security Income program (SSI),<sup>158</sup> Medicare,<sup>159</sup> and Medicaid<sup>160</sup> impact the elder abuse problem substantially.

As noted, one of the leading causes of elder abuse is the increased family stress that caring for an elderly family member entails.<sup>161</sup> Certain policies in the SSI program may add to intra-family stress levels. The SSI program provides a minimum income level for low income, blind, or other disabled candidates for SSI benefits.<sup>162</sup> However, SSI benefits are cut by one-third where such individuals reside in another's household and receive support from that person.<sup>163</sup> This cut in benefits does little to encourage hospitable attitudes on the part of family members who care for elderly persons.

The Medicare program tends indirectly to encourage abuse through its provisions which condition home health care services upon the beneficiary's inability to visit physicians, or need for professional nursing care.<sup>164</sup> The senior's family will normally be able to provide transportation and routine nursing services, thus preventing eligibility for Medicare in many cases. This effectively penalizes those families most willing to assist their elders. The increased burden on the family encourages a stressful atmosphere, which may in turn lead to abuse of the elderly dependent.<sup>165</sup>

Medicaid policies also tend to incite financial abuse of an elderly person by other family members. Medicaid funds nearly fifty percent of all nursing home services in this country<sup>166</sup> and its nursing home program is available without limit to low income individuals.<sup>167</sup> This

158. SSI is a national program established to provide supplemental security income to individuals who have attained age 65 or are blind or disabled. See 42 U.S.C. § 1381 (1983).

159. "Purpose of the statute [(Medicare) is] to insure that adequate medical care is available to the aged throughout this country." *Hultzman v. Weinberger*, 495 F.2d 1276, 1281 (3rd Cir. 1974).

160. "'Medicaid' is a joint federal-state program which provides payment for medical services for those with low incomes and limited resources. . . ." Note, *supra* note 27, at 385 n.153. See also 42 U.S.C. § 1396 (1982).

161. See *supra* note 21 and accompanying text.

162. 42 U.S.C. § 1381 (1982).

163. 42 U.S.C. § 1382a(A)(i) (1982). See also Comment, *supra* note 24, at 163. See generally Note, *SSI Treatment of In-Kind Income—The One Third Reduction Rule*, 65 CORNELL L. REV. 909 (1980) (finding that the one-third reduction rule discourages family members from caring for blind, disabled, or aged SSI recipients and also tends to encourage their institutionalization).

164. See 42 U.S.C. § 1395f(a)(2)(D) (1982); see also Comment, *supra* note 24, at 164.

165. See *supra* note 20 and accompanying text.

166. Blyskal, *Gray Gold*, FORBES, Nov. 23, 1981, at 80.

167. Comment, *supra* note 24, at 166.

preference for underprivileged recipients provides an incentive for "loving" family members to encourage their elderly father or mother to divest their wealth and qualify for Medicaid.<sup>168</sup> Worse yet, the family may ensure qualification by forcefully divesting the elder of her property through theft or exploitation.<sup>169</sup>

Although intended to *benefit* aged, low income, and disabled persons, incentives within SSI, Medicare, and Medicaid tend to create or intensify abusive situations. The PITEAA<sup>170</sup> recognized some of these dangers and provided for the amendment of these programs, but the Act was not passed and the incentives for abuse remain.<sup>171</sup>

## V. ALTERNATIVES AND SOLUTIONS

Commentators have proposed various solutions to the elder abuse problem. The "abolitionist approach" views adult protective services as fundamentally wrong in a society which cherishes liberty.<sup>172</sup> Adherents to this position oppose both protective services and traditional guardianship proceedings, but proponents have failed to propose any viable alternatives to protective services for the elderly.<sup>173</sup>

Other commentators propose a purely voluntary service approach which would divert resources away from involuntary protective services, court-ordered guardianships, and the policing of mandatory reporting requirements.<sup>174</sup> An increased availability of protective services for abuse victims would encourage the elderly to voluntarily seek help if they so desired<sup>175</sup> and ensure the availability of services when needed.

The solution to elder abuse, however, lies not in the choice of one singular approach over another. Rather, a combination of social and protective services should be implemented pursuant to statutes which neither contribute to ageism nor violate civil and constitutional rights. In order to achieve a truly effective program against elder abuse, states must first provide more support services such as home health services, adult day care centers, and emergency shelters for

---

168. See HOUSE ABUSE REPORT, *supra* note 2, at 14.

169. No private insurance is available which covers any substantial amount of the cost of nursing home placement; thus, qualifying the elder by force may unfortunately be the only solution for some families. See Comment, *supra* note 24, at 166.

170. See *supra* notes 156-158 and accompanying text.

171. See HOUSE ABUSE REPORT, *supra* note 2, at 125.

172. See Regan, *supra* note 128, at 1128.

173. *Id.* at 1129. The failure of the abolitionists to address the implications of their position was described by Regan as "an ideological fantasy emanating from a neo-conservative revival of laissez-faire individualism." *Id.*

174. See Comment, *supra* note 68, at 761-64; Regan, *supra* note 128, at 1131.

175. See generally Regan, *supra* note 128, at 1130-31.

the elderly.<sup>176</sup> In so doing, not only would stress on the family be reduced, but abused elders would be more likely to seek assistance, report abuse to authorities, and seek appropriate civil and criminal remedies if nonthreatening alternatives to their existing housing situation were available.<sup>177</sup> In addition, states would be better equipped to successfully implement the least restrictive alternative approach,<sup>178</sup> since more alternatives would be available.

The federal government should respond by amending those SSI, Medicare, and Medicaid policies which indirectly tend to increase the financial abuse of the elderly.<sup>179</sup> In addition, since the federal government plays a unique role in protecting and guaranteeing important civil and constitutional rights,<sup>180</sup> it could initiate a program of funding state adult protective services, on condition that the states ensure procedural due process and pursue the least restrictive measures in doing so.<sup>181</sup>

Only when adequate services exist to properly care for abused elders should states implement some type of reporting statute. Without proper support services with due process safeguards, mandatory reporting requirements probably do more harm than good.<sup>182</sup> The perceived need for mandatory reporting is based upon the notion that elders often will not or cannot report abuse, and that their situation should therefore be reported for them by third parties. Not only is this assumption harmful to seniors,<sup>183</sup> its correctness is also doubtful since most reports of abuse stem from non-mandated sources.<sup>184</sup> Nevertheless, if states wish to forego voluntary reporting, and require mandatory reporting, such reporting statutes should be aimed at reporting the abuse of *any* adult, not just those who are elderly. This approach would avoid further development of notions that the aged are incompetent or infantile.<sup>185</sup>

---

176. Comment, *supra* note 24 at 168; see also Butler, *Financing Non-Institutional Long-Term Care Services for the Elderly and Chronically Ill: Alternatives to Nursing Homes*, 13 CLEARINGHOUSE REV. 335 (1979) (noting that day care centers for senior citizens have relieved the burden of caring for persons who need skilled services but not full institutionalization).

177. See Comment, *supra* note 24 at 169; see also *supra* notes 21, 37-60, and accompanying text.

178. See *supra* notes 143-153 and accompanying text.

179. See *supra* notes 158-171 and accompanying text.

180. Comment, *supra* note 24, at 167.

181. *Id.* at 171.

182. See *supra* notes 62-114 and accompanying text.

183. See *supra* notes 68, 82-87, and accompanying text.

184. See *supra* notes 95-97 and accompanying text.

185. See discussion of "ageism," *supra* notes 80-89 and accompanying text.



## VI. CONCLUSION

Though recently discovered and documented, abuse of the elderly by family members occurs only slightly less frequently than child abuse. The magnitude of the problem continues to grow as the percentage of Americans over sixty-five years of age increases and state and federal budgets for human services continue to shrink. State legislative response to the crisis has been timely, with well over half the states having passed some form of an Adult Protective Services Act.

Traditional criminal and civil remedies are largely ineffective in protecting against, and punishing perpetrators of, elder abuse. This is not surprising since these remedies emerged long ago for purposes other than protecting the elderly. Protective services legislation enacted in many states, though well intentioned, tends to include provisions which imply that the elderly abuse victim, by reason of age, is incompetent and infantile. Such provisions unwittingly encourage ageism. The widespread biases and prejudices toward the elderly which are associated with ageism in turn contribute to elder abuse. It is both ironic and unfortunate that laws enacted to aid the elderly actually tend to further the root cause of their harm.

Additionally, the administration of adult protective services must not abridge the elder's constitutional and civil rights. In order to prevent such intrusions, states must allow for procedures complying with procedural due process requirements and seek to provide the least restrictive alternative under the circumstances.

The long-accepted notion of respecting and caring for the elderly, dating back at least as far as the Old Testament commandment to "honor your father and mother,"<sup>186</sup> has lately become eroded by notions that senior citizens are inferior, and burdensome on society. These feelings contribute to the abuse and neglect of elders by society in general and also by members of their own families. Lawmakers addressing this national tragedy must seek to restore the honor once enjoyed by senior citizens as they promulgate rules designed to end the abuse of our nation's elderly.

DAVID P. MATHEWS

---

186. *Exodus* 20:12.